No. 93-162

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1993

ROBERT L. SMITH,

*Petitioner,*

versus

SCOTT PAPER COMPANY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

This case involves a question of federal procedural due process. If a motion for summary judgment is filed as to one, limited, question of law, and is treated as such by the trial court, and the parties rely upon the limited nature of the motion in their evidentiary submissions and arguments, on appeal, is the non-movant entitled to reasonable notice and an opportunity to be heard before the appellate court may convert the limited motion for summary judgment into a general motion for summary judgment on the merits and affirm?

* * *

Factually, in this state court tort action, respondent filed a motion for summary judgment which raised only the defense of res judicata. Respondent raised no other issues and submitted no evidence attacking the merits of petitioner's claims. The trial court granted summary judgment solely on the basis of res judicata. On appeal, the Alabama Supreme Court agreed that petitioner's tort claims were not barred by res judicata. Nevertheless, without giving petitioner any notice that the merits could be examined for the first time on appeal, and contrary to its own rules of court and appellate opinions, the court affirmed summary judgment because it found that petitioner had failed to submit sufficient evidence on the merits of his claims. The court based its affirmance on the procedural rule that "a correct judgment . . . will not be reversed even if the trial court has based it on the wrong reasons." Even though respondent had not moved for

## QUESTION PRESENTED – Continued

summary judgment on the merits and had not submitted *any* evidence attacking the merits (and therefore had not effected a shifting of the evidentiary burden to petitioner), the court ruled that petitioner had failed to refute respondent's *"prima facie"* showing that it was entitled to summary judgment on the merits. On application for rehearing, two justices recognized that the court's affirmance violated procedural due process.

Does the Due Process Clause require that a litigant be given notice and an opportunity to submit evidence, complete discovery, and argue his case before an appellate court may affirm summary judgment on a ground which was never raised in or decided by the trial court?

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## PETITION FOR A WRIT OF CERTIORARI

Robert L. Smith ("Mr. Smith") respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

## OPINIONS BELOW

The order of the Circuit Court of Mobile County, Alabama granting summary judgment in favor of respondent is unreported, but is appended hereto as Appendix "B" (*infra*, at pp. 2a-9a). The Alabama Supreme Court's opinion affirming the summary judgment *on a different ground than that raised below* is not yet reported, but is appended hereto as Appendix "C" (*infra*, at pp. 10a-13a).

The Alabama Supreme Court's denial of Mr. Smith's application for rehearing is not yet reported, but is appended hereto as Appendix "D" (*infra*, at pp. 14a-19a).

## JURISDICTION

The judgment of the Alabama Supreme Court denying petitioner's application for rehearing was entered on April 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## STATEMENT OF THE CASE

This petition arises out of a summary judgment which the Alabama Supreme Court affirmed on a ground never raised or argued in the trial court. On application for rehearing, two justices of the Alabama Supreme Court implicitly agreed that a due process violation occurred in this case.

The pertinent facts are not in dispute. Petitioner ("Smith") suffered an on-the-job injury to his back and was unable to return to work. Smith filed a claim for workmen's compensation benefits with his employer, respondent Scott Paper Company ("respondent"). Respondent refused to pay such benefits, claiming that the accident was not work-related. Smith then applied for major medical insurance benefits through a self-insured arrangement respondent provided its employees. An employee of respondent represented to Smith (falsely) that he was not entitled to any insurance benefits unless

he stated on his claim form that his injury was *not* work-related, which would disqualify him for workmen's compensation benefits. Smith refused to lie on his claim form. Respondent then refused to pay any major medical insurance benefits. Without income, insurance, or workmen's compensation benefits, Smith's mounting medical and other expenses drove him into bankruptcy. The evidence indicated that Smith's experience was part of a larger scheme by respondent to avoid its liability under Alabama's workmen's compensation laws.

Smith first filed a workmen's compensation claim in the Circuit Court of Mobile County, Alabama. Following a hearing, the court awarded Smith workmen's compensation benefits, including benefits for the medical bills incurred as a result of his back injury. Respondent did not appeal.

Following the workmen's compensation proceedings, Smith filed a separate tort action against respondent in state court in which he alleged (1) that respondent had fraudulently misrepresented his eligibility for workmen's compensation and insurance benefits; (2) that respondent had intentionally and wrongfully employed economic coercion over Smith in order to avoid its liability under Alabama's workmen's compensation laws; and, (3) that respondent's conduct constituted the tort of outrage under Alabama law.[1]

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[1] These are valid causes of action under Alabama law. In *Lowman v. Piedmont Exec. Shirt Mfg. Co.*, 547 So.2d 90 (Ala. 1989), a case involving identical allegations, the Alabama Supreme Court held that an employee's suit against his employer for fraud and outrage are not barred by the exclusivity provisions of Alabama's workmen compensation laws.

Before discovery on the merits was complete, respondent filed a limited motion for summary judgment in which it claimed that Smith's tort action was barred by the doctrine of res judicata, i.e., that Smith should have included his tort claims in his workmen's compensation petition. *It is undisputed that respondent's motion for summary judgment did not challenge the sufficiency of the evidence on the merits of Smith's claims.* Respondent's motion is appended hereto as Appendix A, *infra*, at 1a.

Respondent filed very little evidence to support its motion. Importantly, the evidence it did file was *strictly limited* to the res judicata issue.[2] In opposition to respondent's res judicata arguments, Smith filed copies of the remaining depositions which had been taken in the case as well as certain documents produced by respondent.[3] Smith's purpose in filing this evidence was simply to acquaint the trial court with the facts surrounding his claims. *It is undisputed that Smith did not file this evidence for the purpose of rebutting a motion for summary judgment on the merits (i.e., sufficiency of the evidence) because respondent had not filed one.* Neither party at any point argued the merits of the case (either in brief or orally at the hearings held).[4]

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[2] Scott submitted only the transcript from the workmen's compensation trial, the written judgment from the workmen's compensation case, two letters from the workmen's compensation attorney, and Mr. Smith's deposition.

[3] In fact, discovery was incomplete when Scott filed its limited motion for summary judgment on the res judicata defense. A motion to compel Scott to produce the subject insurance policy was still pending at the time Scott filed its motion.

[4] The parties filed numerous briefs with the trial court *all of which were strictly limited to the applicability of the doctrine of res judicata.*

The trial court granted respondent's motion for summary judgment solely on the basis of res judicata. In granting summary judgment, the trial court expressly stated that it did "not weigh the evidence alleged to support the claims made in the second [instant] lawsuit . . . ." App. at 2a. The trial court's entire order deals *exclusively* with the applicability of the doctrine of res judicata. App. at 2a-9a

Smith timely appealed the granting of summary judgment to the Alabama Supreme Court. As in the trial court, the parties' appellate briefs addressed only the res judicata defense. Neither party mentioned or argued the sufficiency of the evidence on the merits of Smith's claims. The court denied Smith's request for oral argument.

On February 5, 1993, the Alabama Supreme Court held that Smith's tort claims were *not* barred by res judicata. App. at 10a-12a. Nevertheless, despite the limited nature of respondent's motion for summary judgment, the narrow scope of the trial court's ruling, and the limited arguments on appeal, the court affirmed summary judgment in favor of respondent.

Citing the procedural rule that "a correct judgment . . . will not be reversed even if the trial court has based it on the wrong reasons" (hereinafter the "correct judgment rule"), the court considered the merits of the case for the first time on appeal. Without the benefit of a complete record or any arguments from either party, the court found that Smith had failed to present sufficient evidence in support of his fraud and outrage claims. Even though respondent had not moved for summary judgment on the

merits and had not submitted *any* evidence to support such a motion, and therefore had not effected a shifting of the evidentiary burden to Smith,[5] the Alabama Supreme Court incredulously ruled that Smith "did not refute Scott Paper's *prima facie* showing that there was no genuine issue of material fact and that it was entitled to a judgment as a matter of law on these claims." App. at 13a.

Smith filed an immediate application for rehearing in which he strenuously argued that the court's application of the correct judgment rule violated his right to fair notice and an opportunity to be heard under the Due Process Clause of the Fourteenth Amendment. Smith argued that the court's decision violated due process because: (1) he was never given notice that the sufficiency of the evidence of his claims was in issue or that the court might reach these issues *sua sponte* on appeal; (2) he was never given the opportunity to submit all of his evidence[6] or to argue the legal sufficiency of the evidence submitted; and, (3) pursuant to Alabama's procedural rules, the

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[5] Under Rule 56 of the Alabama Rules of Civil Procedure, Alabama's summary judgment rule, a defendant must make a prima facie showing that there are no genuine issues of material fact before *any* burden shifts to the plaintiff to present evidence supporting his claims. *King v. Colbert County*, [Ms. 1920102, May 7, 1993], *slip op.* at 5, ___ So.2d ___ (Ala. 1993).

[6] Smith had not completed his formal discovery when Scott filed its motion. Under Alabama law, a motion for summary judgment *on the merits* of a claim should not be heard until the parties have had an opportunity to complete their discovery. *Water View Developments, Inc. v. Eureka, Inc.*, 512 So.2d 916 (Ala. 1987) ("A party is entitled to complete his or her discovery in order to be able to counter a motion for summary judgment").

evidentiary burden never shifted to Smith since respondent failed to make out a *prima facie* case for summary judgment. Smith further argued that the court decided an issue never presented to or decided by the trial court, in violation of the court's own procedural rules which prohibit the court from considering such issues.

The Alabama Supreme Court rejected Smith's federal due process arguments without opinion. App. "D", *infra*, at pp. 14a-19a. Interestingly, Smith's application for rehearing caused two of the original five justices to change their positions with respect to the affirmance of summary judgment. Justice Maddox dissented from the denial of Smith's application for rehearing because

> "On application for rehearing, I have become convinced, after reading Smith's brief, that the only issue this Court should have decided on original submission was the question of the propriety of the summary judgment on Scott Paper's defense of res judicata. Therefore, I must disagree with the Court's refusal to grant rehearing and reverse the action of the trial court."

App. at 14a-15a. Without Justice Maddox's vote, the court did not have a majority to affirm summary judgment. Consequently, Justice Houston, who did not vote on the case initially, sat on the case and voted to affirm summary judgment. App. at 14a.

The application for rehearing caused another justice, Justice Almon, to completely change his mind with respect to the res judicata defense. On rehearing, Justice Almon opined that res judicata *did* bar Smith's tort action. App. at 15a-19a. Although Justice Almon ultimately

voted to affirm summary judgment, he, like Justice Maddox, found merit to Smith's due process arguments:

> "Smith argues forcefully on rehearing that the summary judgment motion raised only the *res judicata* issue (see Appendix B to this opinion); that the parties joined issue only on this question, not on the merits; that Smith therefore did not introduce evidence on the merits; and that the affirmance issued by this Court thereby deprives him of property without due process. I note that Smith introduced a great deal of evidence in support of his argument that *res judicata* did not bar this action. That evidence might suffice to establish that Scott Paper is entitled to a judgment as a matter of law, but because Smith argues rather persuasively that the merits of his claim are not presented in the posture of this appeal, I have re-examined the *res judicata* question."

App. at 18, n.2.

Mr. Smith petitions this Court to review whether the Alabama Supreme Court's application of the correct judgment rule violates procedural due process principles.

## REASONS FOR GRANTING THE PETITION

There are special and important reasons for granting the instant petition. S. Ct. R. 10.1. This Court has never reviewed the due process implications of the correct judgment rule.[7] S. Ct. R. 10.1(c). This petition presents a

[7] In fact, petitioner's research failed to yield a single case, state or federal, discussing the due process implications of the correct judgment rule.

simple but vitally important question concerning the constitutional bounds of appellate review. Every state in the union has a correct judgment rule,[8] as do several federal

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[8] *See, Municipality of Anchorage v. Higgins*, 754 P.2d 745 (**Alaska** 1988); *City of Phoenix v. Geyler*, 144 **Ariz.** 323, 330, 697 P.2d 1073, 1080 (1985); *Smachover State Bank v. Orwalt*, 307 **Ark.** 432, 821 S.W.2d 757 (1991); *Huggins v. Longs Drug Stores California, Inc.*, 11 Cal. App. 4th 550, 14 **Cal.** Rptr.2d 77 (1992); *Elare v. Department of Administration*, 844 P.2d 1267 (**Colo.** 1992); *Delfino v. Planning and Zoning Commission of the City of Torrington*, 620 A.2d 736 (**Conn.** 1993); *Smith v. Bank of Delaware*, 43 **Del.**Ch. 124, 219 A.2d 576 (1966); *Mninopoliski v. Irish*, 445 A.2d 339, (**D.C.** 1982); *Klein v. Hendry Co. Hosp. Authority*, 596 So.2d 1253 (**Fla.** 1992); *Dominak v. Sander Telephone & Telegraph Co.*, 422 S.E.2d 887 (**Ga.** 1992); *Brooks v. Minnesota*, 836 P.2d 1081 (**Hawaii** 1992); *Idaho Schools for Equal Education Opportunity v. Evans*, 850 P.2d 724 (**Idaho** 1993); *Nikoliz v. Seidenberg*, 242 **Ill.** App.3d 96, 610 N.E.2d 177, 188 (1993); *Allstate Ins. Co. v. Ketchar*, 592 N.E.2d 694 (**Ind.** 1992); *State Ex Rel. Miller v. National Farmer Organization*, 278 N.W.2d 905 (**Iowa** 1979); *Baumann v. Excell Industry, Inc.*, 845 P.2d 65, 69 (**Kan.** 1993); *Vega v. Cosair Charities Committees, Inc.*, 832 S.W.2d 895 (**Ky.** 1992); *Succession of Veleasquez-Blaine*, 471 So.2d 731 (**La.** 1985); *Babal v. Weere*, 583 A.2d 1928 (**Me.** 1990); *Abrams v. City of Rockville*, 88 **Md.** App. 588, 596 A.2d 116 (1991); *Rust Broadway Task Force v. Boston Housing Authority*, 414 **Mass.** 394, 397, 608 N.E.2d 713, 715 (1993); *Jennings v. Southwood*, 449 N.W.2d 460 (**Mich.** 1993); *Baines v. Piper, Jaffary, Hopwood, Inc.*, 497 N.W.2d 263 (**Minn.** 1993); *Love v. Barnett*, 611 So.2d 205 (**Miss.** 1992); *Fix v. Fix*, 847 S.W.2d 762 (**Mo.** 1993); *Hiam v. City of Red Lodge*, 247 **Mont.** 400, 807 P.2d 195 (1991); *Nickols Media Consultants, Inc. v. Ken Moorehead Investment Co., Inc.*, 491 N.W.2d 368, 374 (**Neb.** 1992); *Rowensteins v. Steele*, 103 **Nev.** 571, 747 P.2d 230 (1987); *Quinlan v. City of Dover*, 614 A.2d 1057 (**N.H.** 1992); *Isko v. Planning Bd. of Livingston TP*, 51 **N.J.** 162, 238 A.2d 457 (1967); *Bustamante v. City of Las Cruces*, 836 P.2d 98 (**N.M.** 1992); *Menorah Nursing Home, Inc. v. Zukor*, 153 Ad.2d 13, 548 **N.Y.S.**2d 702 (1989); *Optway Button v. Blontes*, 107 **N.C.** App. 615, 421 S.E.2d 381 (1992); *Strawser v. Wright*, 80 **Ohio** App. 3d 751,

appellate courts.[9]

Petitioner does not suggest that the correct judgment rule is unconstitutional *per se*. To the contrary, the rule clearly has appropriate and valid fields of operation. However, the rule can violate fundamental notions of due process, where, as here, the reviewing court applies it to dispositive issues which were not raised or joined between the parties below, and to which the aggrieved party received no notice or the opportunity to respond. "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Bell v. Burson*, 402 U.S. 535, 540 (1971). This case presents a classic example of this principle.

This issue is particularly timely since the lower state and federal courts, faced with record docket levels, are searching for new ways to "move" cases through the

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610 N.E.2d 610 (1992); *Hurt v. Noble*, 817 P.2d 744 (**Okla.** 1991); *Capital Investment Corp. v. Lofgren*, 724 P.2d 862 (**Or.** App. 1986); *Equitable Life Assoc. Soc. v. Murphy*, 621 A.2d 1078 (**Pa.** 1993); *Andersen v. Sundlun*, 625 A.2d 213 (**R.I.** 1993); *Watkins Meter Line, Inc. v. Span-America Med.*, 296 S.C. 175, 371 S.E.2d 2 (1988); *Seymour v. Western Dakota Voc. Tech. Institute*, 419 N.W.2d 206 (**S.D.** 1988); *Dudley v. UNISYS Corp.*, 852 S.W.2d 435 (**Tenn.** 1992); *J & J Equipment, Inc. v. Pilktinton*, 850 S.W.2d 804 (**Tex.** 1993); *Jeperson v. Jeperson*, 610 P.2d 326 (**Utah** 1980); *Gochey v. Bombandis, Inc.*, 572 A.2d 921 (**Vt.** 1990); *Dziurnoski v. Dz*, 14 **Va.** App. 758, 418 S.E.2d 724 (1992); *Hofland v. City of Ocean Shores*, 847 P.2d 428 (**Wash.** 1993); *Cumberland Chevrolet v. General Motors Corp.*, 420 S.E.2d 295 (**W.Va.** 1992); *Johnson v. Seipel*, 449 N.W.2d 66 (**Wis.** 1989); *City of Laramie v. Hysong*, 808 P.2d 199 (**Wyo.** 1991).

[9] At least two federal circuits utilize the correct judgment rule. *See, Scibally v. Time Ins. Co.*, 724 F.2d 101 (10th Cir. 1983); *Lum Wann v. Espevdy*, 321 F.2d 123 (2d Cir. 1963).

system.[10] While greater efficiency is to be encouraged and applauded, it must not be allowed to erode the due process rights of litigants.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

*Stanley v. Illinois*, 405 U.S. 645, 656 (1972). This is especially important in the judicial setting since the procedural rules followed by the courts are perceived by many to exemplify the minimum requirements of due process.

Second, the Alabama Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this Court. S. Ct. R. 10.1(c). The Court has held in more decisions than can reasonably be cited in this petition that before a court or other governmental agency may constitutionally deprive an individual of a

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[10] As examples of the large volume of literature on this point, *see*, "Standards Relating to Appellate Delay Reduction (ABA, 1988); Standards Relating to Court Delay Reduction (ABA, 1985); Lauren K. Robel, *Caseload and Judging: Judicial Adaption to Caseload*, 1990 B.Y.U. L. Rev. 3 (1990)); and, Robert E. Litan, *Speeding Up Civil Justice*, 73 Judicature 162 (1989).

property interest, it must first provide due process of law. This Court has emphasized time and again that due process requires, at a minimum, fair notice and an opportunity to be heard at a reasonable time and in a reasonable manner. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Armstrong v. Manzo*, 380 U.S. 545, 565 (1965).

> "The Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest."

*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Moreover, "[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1983). By denying Smith's application for rehearing, four justices of the Alabama Supreme Court rejected these fundamental principles.

In this case, the Alabama Supreme Court agreed that the trial court incorrectly granted summary judgment on the basis of the res judicata defense. Res judicata was the *only* issue raised by respondent's motion for summary judgment and was the only ground argued to and ruled upon by the trial court. Despite the limited nature of

respondent's motion, the trial court's ruling, and the arguments made on appeal, the Alabama Supreme Court reached the merits of the case for the first time on appeal. In short, the court summarily deprived Smith of a property right[11] without even the most rudimentary form of due process.

The Alabama Supreme Court reached the merits of this case notwithstanding its own procedural rules which clearly require that a party be given notice that his action is subject to dismissal on the merits and an opportunity to present evidence in opposition.[12] Moreover, the court

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[11] It is undisputed that Smiths' claims constitute a property right for purposes of due process. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 429. "This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* Moreover, whether a party has a "property" interest within the meaning of the due process clause is a matter which is decided by reference to state law. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The Alabama Constitution provides: "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law." Ala. Const., art. I, § 13. Section 13A-8-1 of the Alabama Code (1975) includes a chose-in-action in the definition of "property". The Alabama Supreme Court has long recognized that a tort claim constitutes a property right. *See, Carpenter v. McDonald*, 495 So.2d 640 (Ala. 1986) and *Bryson v. Central Electric Co., Inc.*, 402 So.2d 922 (Ala. 1981).

[12] "Rule 56 requires the same notice and hearing where the court contemplates summary judgment on its own initiative as it does when a party moves for summary judgment; i.e., ten

reached the merits even though the evidentiary burden never shifted to Smith.[13] The court also violated its own holdings which prohibit the court from even considering an issue not raised below.[14]

Surely a litigant has the right to rely upon a court's own procedural rules when responding to a limited motion for summary judgment. At a minimum, due process requires that the government adhere to its own published rules and decisions concerning the disposition of

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days notice." *Hales v. First National Bank of Mobile*, 380 So.2d 797 (Ala. 1980).

[13] Under Ala. Rules Civ. Proc., Rule 56, a defendant must make a prima facie showing that there are no genuine issues of material fact before the plaintiff has any obligation to present evidence supporting his claims. *King v. Colbert County*, [Ms. 1920102, May 7, 1993], *slip op.* at 5, ___ So.2d ___ (Ala. 1993). If a defendant does not make such an evidentiary showing, a court may not grant summary judgment. *Id.* In this case, Scott never submitted any evidence on the merits. Consequently, under well-established Alabama procedure, Smith was never under any obligation to submit his evidence. (The *King* case is merely the most recent pronouncement of this rule. Smith could cite scores of cases which reflect this well-settled rule. *See, e.g., Aetna Life & Casualty Co. v. Atlantic & Gulf Stevedores*, 590 So.2d 205, 208 (Ala. 1991)).

[14] The Alabama Supreme Court has repeatedly held that "[i]n reviewing the propriety of a summary judgment, this Court is limited to reviewing the same factors, the same evidence, considered by the trial court when it granted the motion." *Turner v. Systems Fuel, Inc.*, 475 So. 2d 539, 541 (Ala. 1985); *see, also, Cleveland v. Central Bank of the South*, 574 So. 2d 741, 743 (Ala. 1990); *Quill v. Talladega College*, 502 So. 2d 735 (Ala. 1987); *Prudential Ins. Co. of America v. Coleman*, 428 So. 2d 593, 598 (Ala. 1983).

property rights. A state should not be allowed to establish a rule and then change it without notice to the affected party. If a court intends to affirm summary judgment on grounds not raised or argued below, due process requires that it at least notify litigants of this possibility so they can be prepared to meet the challenges if they arise on appeal.

A litigant's right to rely upon established rules of procedure has long been recognized in Alabama. In *Creech v. First Bank of Baldwin County*, 539 So.2d 269 (Ala. Civ. App. 1988), the Alabama Court of Civil Appeals dealt with the unusual situation where a trial court issued a summary judgment on a basis not sought by the moving party. This decision clearly establishes that a court may not enter summary judgment on its own motion unless the aggrieved party was given notice and an opportunity to be heard:

> "The primary concern is not whether a court has the 'power' to enter summary judgment without a motion, but whether the party against whom the judgment was entered was given *sufficient notice and an adequate opportunity* to demonstrate why summary judgment should not be rendered in favor of his opponent. 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure*: Civil 2d § 2720 (1983)."

*Id.* at 270. (emphasis added). Despite this holding, the Alabama Supreme Court affirmed summary judgment without giving Smith notice or the opportunity to demonstrate why summary judgment should not be affirmed in favor of respondent.

In addition, in *Hales v. First National Bank of Mobile*, 380 So.2d 797 (Ala. 1980), the Alabama Supreme Court held that a trial court may not convert, *sua sponte*, a motion to dismiss into a motion for summary judgment without giving notice of the changed status of the motion to the plaintiff prior to entry of summary judgment.

> "If a motion under Rule 12(b)(6) is converted into a motion for summary judgment, both parties shall be given a reasonable opportunity to submit affidavits and other extraneous proofs to avoid a party being taken by surprise through conversion of the motion to dismiss to one for summary judgment.
>
> * * *
>
> "[T]he spirit of Rule 56 requires the same notice and hearing where the court contemplates summary judgment on its own initiative as it does when a party moves for summary judgment; i.e., ten days notice."

*Id.* at 799. In reaching its decision, the court quoted with approval the following language from the United States Court of Appeals for the Fifth Circuit in *Davis v. Howard*, 561 F.2d 655 (5th Cir. 1977):

> " 'We do not hold that a notice to convert a 12(b)(6) motion into a summary judgment must be by written order, but the record must adequately demonstrate that all counsel were aware of the intentions of the district judge to treat the motion as converted, together with a reasonable opportunity afforded to the non-moving party to present, by way of affidavit or otherwise, anything necessary to rebut the contention of the moving party. This does not appear in the instant case, although the district judge may

have verbally advised counsel to this effect, all of which is not revealed in the record.

" 'Today we hold that where matters outside the pleadings are considered in disposition of a Rule 12(b)(6) motion, so as to automatically convert it to one for summary judgment pursuant to Rule 56, or as one made *sua sponte*, the Rule 56 strictures of notice, hearing and admissibility into evidence are strictly required. As Judge Goldberg aptly observed of the notice requirement in *Soley v. Star & Herald Co.*, 390 F.2d 364, 369-70 (5th Cir. 1968): "They [the litigants] cannot read over the judge's shoulder, or penetrate his memory. Nor can we. From Shakespeare's Hamlet to Albee's Tiny Alice, soliloquies and asides have been shared with the audience." Where there is a motion to dismiss for failure to state a claim upon which relief may be granted, there can never be a wide overview by the trial court, beyond the pleadings to include matters outside, without affording all litigants the opportunity to offer their perspectives on the additional matter by way of admissible evidence.

" 'The bridling devices at issue here sustain and insure the most elementary operation of our civil law. The concepts of notice, admissibility, and opportunity to be heard are ancient primaries. Independent from these notions in advocacy, there is the trial court's duty to insure that its basis for judgment is without error. This duty of the trial court distinguishes the margin of allowances we have held in the instance of an original Rule 56 motion for summary disposition following a Rule 12(b)(6) motion. * * * However correct the conclusion below may be

> in the end, we cannot allow the shaving of principles for expediency when those precepts assure order and justice.' "

*Id.* at 799-800, quoting, *Davis, supra,* at 572. Smith had every right to rely upon this holding in responding to respondent's motion for summary judgment.

The Fifth Circuit's rationale in *Davis* is fully applicable here. If a motion for summary judgment is filed as to one, limited, question of law, and is treated as such by the trial court, and the parties rely upon the limited nature of the motion in their evidentiary submissions and arguments, on appeal, the non-movant is entitled to reasonable notice and an opportunity to be heard before the appellate court may convert, *sua sponte,* the limited motion for summary judgment into a general motion for summary judgment on the merits and affirm summary judgment.[15]

Here, however, the Alabama Supreme Court converted respondent's motion for summary judgment without any notice whatsoever. Smith was legitimately under the impression that the Alabama Supreme Court's review was limited to the res judicata issue decided by the trial

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[15] At least two courts have recognized that an appellate court should not apply the correct judgment rule where the aggrieved party has received no notice. *Santaniello v. De Francisco,* 344 N.Y.S. 2d 589, 594, 74 Misc.2d 229, 233 (1973) ("The correct designation of grounds for relief may be cured by treating the proper ground as having been raised, *provided that the opposing party is not prejudiced by . . . lack of notice*"); *Municipality of Anchorage v. Higgins,* 754 P.2d 745, 748 (Alaska 1988).

court.[16] If Smith had known that there was even a *remote possibility* that the Alabama Supreme Court might affirm summary judgment on the merits, he would have produced evidence on the merits and, more importantly, would have vigorously argued the sufficiency of that evidence. However, in light of Alabama's established procedures concerning notice to the non-moving party, the shifting of the evidentiary burden, and the scope of appellate review, Smith had no reason to suspect that summary judgment might be affirmed on the merits.

Respondent will probably argue, as it did in the lower court, that Smith was not denied due process because he did, in fact, submit a great deal of evidence in opposition to the res judicata defense. In its brief in opposition to Smith's application for rehearing, respondent attempted to brush aside Smith's due process arguments by simply reciting the fact that Smith had submitted more evidence than necessary to rebut the res judicata defense. This argument begs the question.[17]

Simply because Smith submitted more evidence than necessary to respond to the res judicata issue does not mean the requirements of due process were met. This is a question of notice. Smith's only purpose in submitting

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[16] *See*, footnotes 11, 12 , and 13, *supra*. In addition, Scott's appellate brief discussed only the res judicata defense.

[17] Justice Almon rejected this argument. As noted in his opinion on rehearing: "I note that Smith introduced a great deal of evidence in support of his argument that *res judicata* did not bar this action. That evidence might suffice to establish that Scott Paper is entitled to a judgment as a matter of law, but . . . Smith argues rather persuasively that the merits of his claim are not presented in the posture of this appeal . . . ."

the evidence was to acquaint the trial court with the facts surrounding his claims, in the same manner that Smith has used this evidence to acquaint this Court with the facts in this petition.

By submitting the evidence, Smith was by no means attempting to refute a motion for summary judgment on the merits because he had no reason to suspect that his case was subject to dismissal on the merits. He never attempted to assimilate the evidence submitted, argue the legal sufficiency of that evidence (including inferences favorable to his position), point out the credibility issues which should be left for the jury, or submit additional evidence specifically directed to some deficiency in his case, all of which he would have been entitled to do (and would have done) if respondent had filed a motion for summary judgment on the merits.

If respondent *had* filed such a motion and, through a brief or oral argument, had identified some deficiency in the merits of Smith's claims, Smith at least would have had "a reasonable opportunity . . . to present, by way of affidavit or otherwise, anything necessary to rebut the contention of the moving party." *Davis, supra,* at 572.

Except in those cases where a court, applying a motion to dismiss-type standard, can clearly and unequivocally conclude that there are no circumstances under which the plaintiff could possibly recover, (such as where the lower court lacked jurisdiction or the pleadings failed to state a claim upon which relief could be granted), due process prohibits appellate courts from deciding dispositive issues for the first time on appeal. This is not to say that an appellate court is bound by the

reasons assigned by a lower court in entering a judgment. On the contrary, an appellate court may legitimately affirm on any ground, regardless of whether it was specifically identified by the lower court, *as long as it was raised in some fashion below*. This simply means that, before applying the correct judgment rule, the appellate court must ensure that the aggrieved party was given adequate notice of that issue and the opportunity to present objections.

Virtually every appellate court in the country decides cases under the rationale of the correct judgment rule. While the rule is not unconstitutional *per se*, when applied as it was in this case, it denies litigants the most basic and fundamental right of due process. By granting this petition, this Court would give meaningful guidance to state and federal appellate courts which often rely on the rule in deciding cases.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

"MOTION FOR SUMMARY JUDGMENT

(Filed Sept. 13, 1991)

"Comes now Defendant, Scott Paper Company, and moves the Court to enter, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, summary judgment in the Defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the Defendant is entitled to a judgment as a matter of law.

"As grounds for its Motion for Summary Judgment, the Defendant will show unto the Court that the Plaintiff is barred from bringing this action by doctrines of res judicata, judgment estoppel and collateral estoppel.

"In support of this motion, Defendant files the pleadings in this case; pleadings, judgment and portions of trial transcript in the case entitled *Robert Smith v. Scott Paper Company,* CV-89-724 in the Circuit Court of Mobile County, Alabama; the deposition of Robert L. Smith taken in this case; correspondence attached hereto as Exhibits 'A' and 'B'; and Brief in Support of the Motion for Summary Judgment which will be filed prior to oral argument.

"The Defendant respectfully requests oral argument."

## APPENDIX B

## IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

| | | |
|---|---|---|
| ROBERT L. SMITH, Plaintiff, | § | CIVIL ACTION NO. CV-90-003447 |
| v. | § | |
| SCOTT PAPER COMPANY, Defendant. | § | |

## ORDER AND JUDGMENT

This cause comes before the Court on the Motion for Summary Judgment by Scott Paper Company (hereinafter "Scott"). The basis of Scott's motion is that the claims made by Plaintiff in this suit are barred by the doctrine of res judicata due to the June 11, 1990 judgment of this Court in an earlier lawsuit between Plaintiff and Scott. Scott's position is that the earlier judgment for Plaintiff in a lawsuit for workman's compensation benefits bars Plaintiff's claims in this second lawsuit in which Plaintiff seeks damages from Scott based on alleged wrongful conduct in the denial of those benefits or an alternative accident and sickness benefit for non-job-related injuries for the same incident. The thrust of Plaintiff's position is that the motion should fail because there is ample evidence of fraudulent/outrageous mishandling of Plaintiff's claim for these benefits and the claim in the first lawsuit is not the same "cause of action" as the claims in this lawsuit.

In ruling on a Motion for Summary Judgment based on res judicata the Court does not weigh the evidence

alleged to support the claims made in the second lawsuit, but considers whether the claims made in both lawsuits arise out of the same nucleus of operative facts. If the claims in both lawsuits arise out of the same "nucleus of operative fact" then res judicata applies not only to the precise legal theory or claim presented in the prior case but to all legal theories and claims brought in the second lawsuit between the same parties which could have been brought in the first lawsuit.

With this in mind the Court upon consideration of the arguments, extensive briefs and matters of record finds and determines as follows:

## FINDINGS OF FACT

1. On October 3, 1988, Plaintiff sustained a sprained back while working for Scott. He reported the injury to Scott as a workman's compensation claim and Scott treated the injury as a workman's compensation claim and paid Plaintiff's medical bills and lost time from employment. Plaintiff was on light duty for a few days but on October 10, 1988 was asymptomatic and returned to work with no restrictions.

2. Until January 10, 1989, Plaintiff continued to work for Scott full time plus additional overtime and had no new injury. On January 10, 1989, Plaintiff went to his physician and was diagnosed as having a herniated disc. Plaintiff reported this back condition to Scott on January 14, 1989 and applied for workman's compensation benefits.

3. After medical and factual investigation, Scott notified Plaintiff on February 8, 1989 that workman's compensation benefits were denied because the January 1989 back problem was not related to the October 3, 1988 work incident.

4. On February 10, 1989, Plaintiff applied in a written form to Scott for Accident and Sickness (A&S) benefits which is a plan for coverage of disability caused by non-work related injury or sickness. Plaintiff had made several prior A&S claims for sickness or injury in which Plaintiff stated on the forms that the injury or sickness was not work-related and these claims were paid by Scott. Plaintiff also had prior workman's compensation claims paid by Scott. Plaintiff was aware in February 1989 that the A&S benefit was only for non-work-related injury or sickness. Nevertheless, Plaintiff put on his February 10, 1989 application for A&S benefits that his January 1989 back problem was work-related. The A&S claim was denied because Plaintiff stated on the claim form that his January back problem was work-related. Plaintiff alleges that on or about February 10, 1989, Scott attempted to coerce him to change the A&S form to say that his back problem was not job related. If there was attempted coercion it failed because Plaintiff refused to change the A&S form.

5. Plaintiff did not work from January 16, 1989 through May 21, 1989 when he returned to work full time. Plaintiff filed his first lawsuit in this Court against Scott on March 3, 1989 styled *Robert Smith v. Scott Paper Company*, CV-89-0724. This first lawsuit claimed workman's compensation benefits and a § 25-5-59 *Code of Ala.*

penalty for Scott's alleged failure to pay compensation without good cause.

6. During the pendency of the first lawsuit, Plaintiff through his then attorney acknowledged the existence of tort claims for fraud and outrageous conduct because of Scott's denial of workman's compensation benefits and accident and sickness benefits. By letter dated December 4, 1989, the then attorney for Plaintiff even offered to settle the fraud and outrage claims which Plaintiff claimed arose out of Scott's February 1989 denial of benefits. Plaintiff asserted in the first lawsuit as he does in this lawsuit that he was forced to file bankruptcy because Scott denied benefits in February 1989.

7. It is undisputed that the facts and alleged wrongful conduct for which Plaintiff makes the claims in this lawsuit occurred before the first lawsuit was filed.

8. The transcript of Plaintiff's first trial in April 1990, shows that Plaintiff's then attorney stated to the Court that Scott attempted to coerce Plaintiff into changing his February 10, 1989 A&S claim form to state that his injury was not work-related so that Scott would only be required to pay A&S benefits rather than workman's compensation benefits. The gravamen of Plaintiff's complaint in this second lawsuit is that Scott attempted to coerce Plaintiff to accept A&S benefits instead of workman's compensation and that failure to pay benefits for the January back problem was fraudulent and outrageous. In the second lawsuit complaint, as amended, Plaintiff alleges Scott's conduct was "part of a pattern or practice . . . of intentional wrongful conduct. . . . " The transcript of the trial in the first lawsuit also shows that it

was Plaintiff's position that Scott "has a pattern or practice of trying to get these employees to sign on what's called A&S."

9. In the trial of the first lawsuit, Plaintiff even called a co-employee, Leonard Allen, as a witness to show that Scott had attempted to coerce some employees into accepting A&S benefits rather than workman's compensation benefits. This is the same witness named by Plaintiff in his deposition in this second lawsuit as being a witness to Plaintiff's claim of a "pattern or practice" by Scott as to A&S claims to support Plaintiff's claim of fraud and outrage in this second lawsuit.

10. On June 11, 1990, judgment was entered by the Court in favor of Plaintiff in Plaintiff's first lawsuit and Scott paid and continues to pay workman's compensation benefits to Plaintiff for the back problem which Plaintiff reported in January, 1989. Although the Court entered judgment in favor of Plaintiff in his first lawsuit, the Court denied Plaintiff's claim for the 10% penalty for failure to pay compensation without good cause.

11. On October 3, 1990, Plaintiff filed this second lawsuit claiming that Scott was guilty of outrageous conduct in denying these same workman's compensation benefits and A&S benefits. Plaintiff amended his complaint to state an additional claim for fraud which he also claims arose out of the same denial of benefits to Plaintiff during his temporary disability from January 14, 1989 to May 16, 1989.

12. The facts alleged by Plaintiff in this second lawsuit to constitute fraud and outrage were in existence, known by and available to Plaintiff and his counsel

before and during the pendency of his first lawsuit against Scott.

## CONCLUSIONS OF LAW

1. In order for a judgment in a prior suit to bar a subsequent lawsuit, the following elements should be present: (a) the question of fact must have been litigated and determined by a court of competent jurisdiction; (b) a final judgment must have been rendered on the merits; (c) the parties to both suits must be substantially identical; and (d) the same cause of action must have been presented in both suits. *Hughes v. Martin,* 533 So.2d 188 (Ala. 1988); *Robinson v. Holley,* 549 So.2d 1 (Ala. 1989). If these elements are present then any issue that was, or could have been, adjudicated in the prior lawsuit is barred by the doctrine of res judicata. *Robinson v. Holley, supra; Waters v. Jolly,* 582 So.2d 1048 (Ala. 1991).

2. The four elements required by the doctrine of res judicata are present in this case. Plaintiff's first lawsuit was litigated in and determined by a court of competent jurisdiction. A final judgment was rendered on the merits of the claim Plaintiff chose to bring at that time. The parties to this lawsuit are identical to the parties in Plaintiff's first lawsuit. Furthermore, the same cause of action is present in both lawsuits.

3. The same cause of action exists when "the same evidence is applicable in both actions". *Hughes v. Martin,* 533 So.2d 188 (Ala. 1988). The evidence applicable in Plaintiff's first lawsuit, while not as extensive as the evidence required to sustain the fraud and outrage claims, is evidence that is applicable in this lawsuit. In his

first lawsuit, Plaintiff presented evidence applicable to the claims he asserts in this case. Res judicata bars all legal theories and claims, whether or not asserted in a previous lawsuit, that arise out of the same nucleus of operative fact. *Crutcher v. Wynn*, 591 So.2d 453 (Ala. 1991). Plaintiff's cause of action arises out of Scott's denial of benefits to the Plaintiff. This "nucleus of operative fact", i.e., the denial of benefits to the Plaintiff, gives rise to one cause of action. *Robinson v. Holley*, 549 So.2d at 2.

4. In this case, Plaintiff's claims for workman's compensation benefits, outrageous conduct, and fraud all arise out of the denial of benefits by Scott for the same back problem and work incident. Plaintiff has one cause of action for the claims and legal theories that arise out of the denial of those benefits. Plaintiff cannot split his claims into more than one lawsuit. Because the cause of action has been litigated and those benefits accepted by Plaintiff, Plaintiff is now barred by the doctrine of res judicata from asserting additional claims for fraud and outrageous conduct that arise out of the denial of benefits. *Crutcher v. Wynn*, 591 So.2d at 454; *Robinson v. Holley*, 549 So.2d at 3.

5. When all the elements of res judicata are present, any claim that was or could have been litigated is barred from further litigation. *Martin v. Hughes, supra; Crutcher v. Wynn, supra*. The fact that Plaintiff elected not to bring his fraud and outrageous conduct claims in his first lawsuit does not prohibit the application of the doctrine of res judicata to these claims. *See, Chandler v. Commercial Union Insurance Company*, 467 So.2d 244 (Ala. 1985); *Robinson v. Holley, supra*. Plaintiff could have brought his claim for

fraud and outrageous conduct in his first lawsuit along with his claim for workman's compensation. *See Lowman v. Piedmont Shirt Manufacturing Co.*, 547 So.2d 90 (Ala. 1990). The record shows that Plaintiff's claims for fraud and outrageous conduct arose out of the same nucleus of operative fact as his workman's compensation claim. The record also shows that during the pendency of Plaintiff's first lawsuit, the Plaintiff was aware of his tort claims for fraud and outrageous conduct and even offered to settle those claims. By electing not to bring these claims which could have been litigated in his first lawsuit, Plaintiff is now barred by the doctrine of res judicata from bringing these claims in this lawsuit.

In consideration of the foregoing, it is the opinion of this Court that Plaintiff's Motion for Summary Judgment is well taken and should be granted.

NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED:

1. That the Motion for Summary Judgment is granted;

2. That judgment be, and hereby is, entered in favor of Defendant Scott Paper Company and against Plaintiff;

3. That costs be taxed to Plaintiff.

DONE this 27th day of March, 1992.

/s/ Ferrill D. McRae
Circuit Judge

## APPENDIX C
## SUPREME COURT OF ALABAMA
## OCTOBER TERM, 1992-93

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**1911108**

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**Robert L. Smith**

**v.**

**Scott Paper Company**

**Appeal from Mobile Circuit Court**
**(CV-90-003447)**

(Released Feb. 5, 1993)

**STEAGALL, JUSTICE.**

The plaintiff, Robert L. Smith, appeals from a summary judgment entered in favor of the defendant, Scott Paper Company, in an action alleging fraud and the tort of outrage.

Scott Paper had denied Smith's claim for worker's compensation benefits and, in a previous lawsuit by Smith against Scott Paper, the trial court had entered a judgment awarding Smith the benefits. Smith then filed this action; the trial court entered a summary judgment in favor of Scott Paper, holding that Smith's claims arose out of the same nucleus of operative facts as his earlier worker's compensation claim and that, by not bringing these claims in the first action, Smith was barred by the doctrine of *res judicata* from bringing the claims in this case.

Smith appeals, arguing that the worker's compensation action was not based upon the same cause of action as this tort action and that the doctrine of *res judicata* therefore does not bar the claims in this case. Smith argues that his worker's compensation case did not encompass all of the issues raised in this case and that the evidence and the burden of proof in a worker's compensation case do not support a recovery on the claims in this case.

The elements of *res judicata* are (1) a final judgment on the merits (2) rendered by a court of competent jurisdiction (3) with substantially the same parties and (4) with the same cause of action presented in both cases. *Crutcher v. Wynn*, 591 So.2d 453 (Ala. 1991). Smith concedes that the first three elements of *res judicata* are present in this case; therefore, the question before this Court is whether the same cause of action is presented in this case as was presented in the worker's compensation case.

In *Patrick v. Femco Southeast, Inc.*, 590 So.2d 259 (Ala. 1991), this Court stated that the issues of fact and law in a worker's compensation case are entirely different from those in a fraud action and that the trier of fact in a fraud action and that in a worker's compensation action, and [illegible] evidence to support or refute a fraud claim and that [illegible] sary to support or refute a worker's compensation cla[illegible] are different. In the instant case, the issues of law and [illegible]ct regarding the fraud and outrage claims are differe[illegible] from those presented in the worker's compensatio[illegible] and, as in *Patrick*, the trier of fact in this case is differe[illegible] from that in the worker's compensation case, and the e[illegible]idence necessary to support or refute the fraud

and outrage claims is different from the evidence necessary to support or refute the worker's compensation claims.

Initially we hold, therefore, that Smith's present claims are not barred by the doctrine of *res judicata*. A correct judgment, however, will not be reversed even if the trial court has based it on the wrong reasons. *Boykin v. Magnolia Bay, Inc.*, 570 So.2d 639 (Ala. 1990).

In order to enter a summary judgment, the trial court must determine that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56, A.R.Civ.P. This case was filed after June 11, 1987; accordingly, the "substantial evidence rule" applies to the ruling on the motion for summary judgment. Ala. Code 1975, § 12-21-12. In order to defeat a properly supported motion for summary judgment, the nonmovant must present substantial evidence creating a genuine issue of material fact. *Betts v. McDonald's Corp.*, 567 So.2d 1252 (Ala. 1990). "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida*, 547 So.2d 870, 871 (Ala. 1989).

In order to sustain his fraud claim based on misrepresentation, Smith must present substantial evidence (1) that Scott Paper had a duty to speak the truth, (2) that it falsely represented to him a material existing fact, whether intentionally, recklessly, or innocently, (3) that he relied upon the false representation, and (4) that he suffered loss or damage proximately resulting from the false

representation. *Smith v. MBL Life Assur. Corp.* 589 So.2d 691 (Ala. 1991).

In order to sustain his claim of outrage, Smith must present substantial evidence that Scott Paper, "by extreme and outrageous conduct intentionally or recklessly" caused him to suffer "severe emotional distress." *American Road Service Co. v. Inman*, 394 So. 2d 361, 365 (Ala. 1980); see, also, *Gray v. Liberty National Life Ins. Co.* [Ms. 1911246, December 18, 1992] ___ So.2d ___ (Ala. 1992), and *Bailey v. Avera*, 560 So.2d 1038 (Ala. 1990).

> " 'Extreme conduct' is defined as conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society. The extreme conduct must result in emotional distress so severe that no reasonable person could be expected to endure it."

*Gray v. Liberty National Life Ins. Co.*, ___ So.2d at ___; see *American Road Service Co. v. Inman*, at 365.

The record shows that Smith failed to present substantial evidence in support of his fraud and outrage claims and thus did not refute Scott Paper's prima facie showing that there was no genuine issue of material fact and that it was entitled to a judgment as a matter of law on these claims. See Rule 56. The trial court's judgment is affirmed.

**AFFIRMED.**

**Maddox, Almon, and Adams, JJ., concur.**

**Ingram, J., concurs in the result.**

## APPENDIX D

On Application For Rehearing

(Released April 30, 1993)

STEAGALL, JUSTICE.

APPLICATION OVERRULED.

Adams, Houston, and Ingram, JJ, concur.

Almon, J., concurs specially on denial of application for rehearing.

Maddox, J., dissents.

MADDOX, JUSTICE (dissenting).

On original submission, I concurred in the affirmance of the judgment entered in favor of the defendant, Scott Paper Company, on Smith's claims of fraud and outrage, because of the reasons stated in that opinion.

I am still of the opinion that this Court, on original submission, correctly held that Smith's tort claims were not barred by the doctrine of res judicata because they arose out of the same operative facts as Smith's workers' compensation claim. *Patrick v. Femco Southeast, Inc.*, 590 So.2d 259 (Ala. 1991). In *Patrick*, I believe that the Court stated that the issues of fact and law in a workers' compensation case are entirely different from those in a fraud action and that the trier of fact in a workers' compensation case and the evidence required to support or refute a fraud claim in a workers' compensation case, are not the same as those in a fraud case.

On original submission, however, this Court affirmed the summary judgment on the ground that Smith had

failed to present substantial evidence in support of his fraud and outrage claims to refute Scott Paper's prima facie showing that there was no genuine issue of material fact.

On application for rehearing, I have become convinced, after reading Smith's brief, that the only issue this Court should have decided on original submission was the question of the propriety of the summary judgment on Scott Paper's defense of res judicata. Therefore, I must disagree with the Court's refusal to grant rehearing and reverse the action of the trial court.[1]

ALMON, JUSTICE (concurring specially on denial of application for rehearing).

On application for rehearing, I have reconsidered the issues presented on original submission, and I would now vote to affirm the summary judgment on the ground of *res judicata*. The "same cause of action" element for *res judicata* does not require the same theory of relief to have been presented in the prior action, but only that both actions grow out of "the same nucleus of operative fact." *Crutcher v. Wynn*, 591 So. 2d 453, 454 (Ala. 1991), quoting *NAACP v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990). If the test for res judicata is met, "any *claim* that was or could have been adjudicated in the prior action is barred from further litigation." *Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990) (emphasis added); *Chandler v. Commercial Union Ins. Co.*, 467 So. 2d 244 (Ala. 1985).

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[1] I cannot agree with the special concurring views of Justice Almon that Smith's tort claims arose out of the same operative facts as his workers' compensation claim.

In his workers' compensation action, Smith argued that he should receive the additional 10% payment for failure to pay a workers' compensation claim without good cause. Ala. Code 1975, § 25-5-59 (a 1992 amendment raised the additional payment to 15%). In attempting to show that Scott Paper had failed to pay without good cause, Smith introduced evidence that Scott Paper had tried to coerce him into claiming benefits under its accident and sickness ("A&S") insurance, which covered non-work-related injuries, rather than claiming benefits under the workers' compensation law. The court in the workers' compensation action denied the additional 10% payment. The fraud and outrage claims in this case are based on the same alleged attempt to coerce Smith into filing under the A&S coverage. In entering the summary judgment in this case, the court noted the above-stated facts and also noted:

> "In the trial of the first lawsuit, Plaintiff even called a co-employee, Leonard Allen, as a witness to show that Scott had attempted to coerce some employees into accepting A&S benefits rather than workman's compensation benefits. This is the same witness named by Plaintiff in his deposition as being a witness to Plaintiff's claim of a 'pattern or practice' by Scott as to A&S claims to support Plaintiff's claim of fraud and outrage in this second lawsuit."

The court here also noted, regarding the proceedings in the former action: "By letter dated December 4, 1989, the then attorney for Plaintiff even offered to settle the fraud and outrage claims which Plaintiff claimed arose out of Scott's February 1989 denial of benefits." See Judge McRae's well-reasoned order, attached as Appendix A

[omitted] to this opinion, for a full statement of the evidence and the court's reasons for granting the motion.

In *Patrick v. Femco Southeast, Inc.*, 590 So. 2d 259 (Ala. 1991), Patrick was fired after he claimed workers' compensation benefits. He filed an action alleging wrongful termination, and Femco counterclaimed, alleging fraud. Patrick argued that the counterclaim should have been filed in his workers' compensation action and thus was barred by *res judicata*. The Court disagreed:

> "*Femco's claim alleging fraud,* misrepresentation, and suppression of a material fact *did not arise out of the same operative facts as Patrick's workman's compensation case;* the issues of the fact and law in a workman's compensation case are entirely different from those in a fraud action; the trier of fact in these two claims is not the same; and the evidence to support or refute Patrick's claim and the evidence to support or refute Femco's counterclaim are also different."

590 So. 2d at 261 (emphasis added). The basis of Femco's fraud claim does not appear in the opinion; it does not appear to have been related to Patrick's claim for workers' compensation benefits. In any event, Femco made a showing that it did not discover the fraud until long after the workers' compensation claim had been adjudicated.

Here, by contrast, the fraud and outrage claims are directly related to the denial of workers' compensation benefits and are virtually identical to the claim, litigated in the workers' compensation action, that Scott Paper

delayed payment without good cause.[2] The statement in *Patrick* that the trier of fact is not the same does give me some pause. A workers' compensation claimant is not given a trial by jury except on the question of whether his own willful misconduct caused his injury, if the employer raises that defense. Ala. Code 1975, § 25-5-81(a)(2). However, Smith could still have joined his workers' compensation, fraud, and outrage claims in one complaint and received a jury trial as to the latter two claims. See Rule 18, Ala. R. Civ. P. See *Lowman v. Piedmont Executive Shirt*

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[2] It may well be that even in the absence of *res judicata* Smith could not present substantial evidence of fraud or outrage. After Scott Paper denied his workers' compensation claim, he filed an A&S claim, but indicated on the claim form that the injury was job-related. The alleged coercion by Scott Paper was in its suggestion that he state on the A&S claim that the injury was not job-related. It appears that Scott Paper was simply consistently taking the position that the injury was not job-related. The court held in the workers' compensation action that the delay in payment was not without good cause, and this holding appears to substantiate that Scott Paper had a colorable defense to the claim of a job-related injury. Thus, I see no basis for a finding of fraud or outrage.

However, Smith argues forcefully on rehearing that the summary judgment motion raised only the *res judicata* issue (see Appendix B [omitted] to this opinion); that the parties joined issue only on this question, not on the merits; that Smith therefore did not introduce evidence on the merits; and that the affirmance issued by this Court therefore deprives him of property without due process. I note that Smith introduced a great deal of evidence in support of his argument that *res judicata* did not bar this action. That evidence might suffice to establish that Scott Paper is entitled to a judgment as a matter of law, but because Smith argues rather persuasively that the merits of his claim are not presented in the posture of this appeal, I have reexamined the *res judicata* question.

*Manufacturing Co.*, 547 So. 2d 90 (Ala. 1989), which held that Lowman's claims alleging fraud, conspiracy to defraud, and outrage were not barred by the exclusivity provisions of the Workers' Compensation Act, but that those provisions required proof of the tort claims by clear and convincing evidence. "In her complaint, Ms. Lowman also included a claim for further workers' compensation benefits, alleging that her disability had become permanent." 547 So. 2d at 92.

For the foregoing reasons, I now would hold that the trial court correctly held that the doctrine of *res judicata* bars this action. I therefore concur to overrule the application for rehearing.